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No. 07-712

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In The
Supreme Court of the United States

TRAFIGURA BEHEER B.V.,

Petitioner,

v.

M/T PROBO ELK, HER ENGINES, TACKLE, APPAREL, etc., IN REM, PROBO ELK SHIPPING INC., LAURIN TANKERS AMERICA, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

WILLIAM A. DURHAM
Counsel of Record
BRONWYN G. DOUGLASS
EASTHAM, WATSON, DALE & FORNEY, LLP
808 Travis Street
20th Floor,
Niels Esperson Building
Houston, TX 77002
(713) 225-0905 – Telephone
(713) 225-2907 – Telefax

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent Laurin Tankers America, Inc. is a subsidiary of Laurin Maritime (America) Inc. Both entities are privately held companies. Respondent Probo Elk Shipping Inc. is also a privately held company.

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JURISDICTION

Respondents deny that original federal jurisdiction of this matter was based on 28 U.S.C. § 1337(a). This is an admiralty and maritime matter arising under 28 U.S.C. § 1333(1).

CORRECTIONS TO PETITIONER'S STATEMENT OF THE CASE

This is a very simple matter concerning Petitioner's alleged damages arising from the ocean carriage of a naphtha cargo from Skikda, Algeria to Rotterdam, The Netherlands aboard the M/T PROBO ELK. When the PROBO ELK arrived in Rotterdam, Petitioner claimed that some of the cargo was contaminated and, pursuant to Petitioner's obligation to mitigate its alleged damages, Petitioner arranged for an alternative buyer in Houston, Texas, USA. The PROBO ELK undertook this further carriage, and the cargo was discharged in Houston. While the PROBO ELK was in Houston, Petitioner threatened to arrest it unless a Letter of Undertaking ("LOU") was issued. The LOU was issued and later became the source of Petitioner's objection to the District Court's enforcement of a contractual forum selection clause. Although it is clear that the lower courts properly found the forum selection clause enforceable and that Petitioner has not remotely raised proper issues for granting its Petition for Writ of Certiorari, Respondents provide the following corrections of Petitioner's

misstatements of fact and of the record and do not waive any further objection to them.

1. There is no evidence in the record supporting Petitioner's claim that the cargo was contaminated, much less contaminated during the PROBO ELK carriage.

2. Petitioner's claim has always been for damages it claims arose from the cargo's alleged contamination during the voyage from Skikda to Rotterdam. Only after Respondents attempted to enforce the forum selection clause in the Charter Party did Petitioner suddenly assert that the "claim" was for the voyage itself between Rotterdam and Houston. This, of course, confuses a cause of action with resulting damages. There is no allegation here that the cargo became further contaminated on the mitigation voyage. Petitioner's "claim" is simply for the extra freight between Rotterdam and Houston, which is an expense or damage arising out of the contamination allegedly sustained between Skikda and Rotterdam. As Petitioner pled in its Original Complaint, the extended carriage was "a direct result of the contamination to the subject shipment of naphtha while on board the M/T Probo Elk." (R. Tab 1, p. 8-9, ¶ 8).

3. Although Petitioner now claims that the LOU was issued solely as to the extended carriage to Houston, the language of the LOU explicitly refutes such a contention; the LOU was issued

> in order to obtain security for the claim which is or may be asserted by Trafigura Beheer

> BV Amsterdam in relation to a cargo of Naphtha carried aboard the M/T PROBO ELK under a bill of lading issued on January 7, 2004 at Skikda, Algeria . . .

Petitioner explicitly accepted this language at the time the LOU was issued and has never voiced any objection to it, even now.

4. Petitioner has misrepresented the procedural history of the litigation in the District Court. After failing to provide Respondents with a claim statement for over six months (not including the year between the alleged incident and Petitioner's filing of suit), Respondents advised Petitioner that they would be proceeding with a Motion to Dismiss. Petitioner's only response was to serve Respondents with discovery requests and Initial Disclosures. Respondents then promptly moved for dismissal as well as served their discovery responses expressly subject to their rights to dismissal. There was no Order issued against Respondents regarding discovery production until Petitioner began filing multiple motions to compel (*after* Respondents filed their Motion to Dismiss Based on Forum Selection Clause), claiming that Respondents were intentionally "obfuscating" the discovery process. Respondents were then ordered to participate in discovery on the merits despite their pending Motion to Dismiss Based on Forum Selection Clause. Petitioner's characterizations of the docket are clearly disingenuous given its other, completely contrary allegations that Respondents were "pointedly participating" in discovery (asserted by Petitioner as a

basis for prejudice to support non-enforcement of the forum selection clause). Such mischaracterizations by Petitioner have been commonplace throughout this litigation and appeal.

RESPONSE TO POINT 1: THIS WAS A DISMISSAL FOR IMPROPER VENUE, NOT LACK OF JURISDICTION

Petitioner continues to confuse jurisdiction with venue. At no time during the litigation did Respondents move for dismissal for lack of jurisdiction. Respondents moved for dismissal expressly pursuant to Federal Rules of Civil Procedure 12(b)(3) (venue) and 12(b)(6) (failure to state a claim) and 28 U.S.C. § 1406 (cure of venue defects). (R. Tab 13, p. 71, ¶ 7). The dismissal was not based on Federal Rule of Civil Procedure 12(b)(1) (subject matter jurisdiction) or 12(b)(2) (personal jurisdiction). Thus, any of Petitioner's arguments regarding waiver or admission of jurisdiction are inapposite. As Respondents have previously briefed, they did not and do not contest that *in rem* jurisdiction was established over the vessel PROBO ELK just as if the vessel had been arrested, saving any other available defenses. Respondents moved for dismissal based on improper venue, a Motion to Dismiss Based on Forum Selection Clause is properly brought as an objection to improper venue (*Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005)), and the District Court properly dismissed Petitioner's claims

in favor of the proper agreed venue in London. On appeal, the Court of Appeals for the Fifth Circuit expressly addressed Petitioner's mistaken 'conflation' of jurisdiction and venue. Appearance as a Claimant on behalf of a vessel *in rem* does not waive objections to venue. *Trafigura Beheer B.V. v. M/T PROBO ELK*, 2007 WL 2033336, *1 (5th Cir. 2007). Respondents expressly reserved their objections to improper venue in their Original Answer and timely moved for dismissal based on the agreed forum selection clause.[1]

RESPONSE TO POINT 2: THERE WAS NO PHANTOM CHARTER PARTY; THE ORIGINAL CHARTER PARTY CONTROLLED THE MITIGATION CARRIAGE

There is no evidence in the record that Petitioner and Respondents executed a new and apparently verbal Charter Party for the on-carriage to Houston. The mitigation carriage to Houston was simply an extension of the original freight from Skikda, and the same contractual terms (many of which were supplied by Petitioner as part of its standard terms) applied. Petitioner's claim that there were no concrete contractual terms for the extended carriage is contrary to Petitioner's allegations in its Original Complaint.

[1] That Petitioner failed to ask the District Court to retain the posted security pending London adjudication has no relevancy as to whether Respondents' motion to dismiss was brought as an objection to jurisdiction or an objection to venue.

Petitioner specifically pled that the Charter Party applied and included a cause of action for breach of contract. (R. Tab 1, p. 8, ¶ 5; p. 9). In its Initial Disclosures and in support of its claim, Petitioner produced a form copy of the BEEPEEVOY3 charter party form as well as the specific amendments and riders *required by Petitioner*. Petitioner is a sophisticated business entity with multiple offices around the world. It is incomprehensible that Petitioner, who uniformly requires standard amendments and riders to its charter contracts, would decide on this voyage (concerning allegedly contaminated cargo) not to use any other terms than load port, discharge port, and cargo identification. In any event, as Petitioner's claims arise out of the carriage between Skikda and Rotterdam and not Rotterdam to Houston, whether the forum selection clause at issue applied to the latter carriage is irrelevant. The forum selection clause clearly applied to the carriage between Skikda and Rotterdam, and Petitioner's claims were properly dismissed in favor of the contractually agreed forum.

RESPONSE TO POINT 3: PETITIONER WAIVED ENGLISH LAW ARGUMENT

The Court of Appeals for the Fifth Circuit correctly refused to consider Petitioner's arguments regarding English law because Petitioner failed to properly plead and prove them in the District Court. Petitioner claims that an appellate court can consider

any issue it desires at any time and that there is no precedent to the contrary. This is simply wrong. The Court of Appeals was expressly bound by Federal Rule of Civil Procedure 44.1 and the Court's prior decisions, including *Banque Libanaise* in which it held, "If the [appellant] wanted to rely on [foreign law], it was obligated to present to the district court clear proof of the relevant [foreign] legal principles." *Banque Libanaise pour le Commerce v. Khreich,* 915 F.2d 1000, 1006 (5th Cir. 1990). Petitioner failed to raise, let alone prove, English law in the District Court. English law could not have been considered by the District Court, and the Court of Appeals correctly refused to entertain Petitioner's untimely foreign law assertions.

PETITIONER HAS FAILED TO MEET THE STANDARD FOR WRIT OF CERTIORARI

Only a cursory review of the Petition for Writ of Certiorari shows that it unequivocally fails to comply with Supreme Court Rule 10 and falls far short of the threshold standard for review on Certiorari. Review on Certiorari is not a matter of right but of judicial discretion. SUPREME COURT RULE 10. This Court grants review on Certiorari only for "compelling reasons". *Id.* Corrections of erroneous factual findings or a misapplication of a properly stated rule of law are not generally considered proper for review on Certiorari. *See id.* Proper reasons may include:

(1) conflict between decisions of United States Courts of Appeals on an important matter;

(2) conflict between the decision of a United States Court of Appeal and a decision by a state court of last resort;

(3) a United States Court of Appeal's far departure from accepted and usual course of judicial proceedings (thereby warranting this Court's supervisory power);

(4) conflict between a state court of last resort's decision on an important federal question and the decision of another state court of last resort or of a United States Court of Appeals;

(5) an important question of federal law has been decided by a lower court that should be, but has not been, settled by this Court; or,

(6) conflict between the decision of a lower court on an important question of federal law with relevant decisions of this Court.

Id.

None of the above reasons are implicated or in fact even suggested. Petitioner has not identified any previous decision, whether of this Court, any United States Court of Appeals, or any state court of last resort, that conflict with the decisions of the District Court and Court of Appeals in this matter. Petitioner

further has not identified or alleged that the District Court or Court of Appeals engaged in a "far departure" from normal judicial proceedings. Finally, Petitioner has not suggested that the lower decisions contain novel and important issues of federal law that have not been but should be decided by this Court. In fact, this Court has already addressed the pertinent legal issues in the seminal decision *The BREMEN. M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). Petitioner is only suggesting that the District Court made factual errors and misapplied legal standards, erroneously affirmed on appeal, which are not proper grounds for review on Certiorari. *See* SUPREME COURT RULE 10.

CONCLUSION

The issues in this matter are very simple, well settled, and do not require review on Certiorari by this Court. Petitioner's mischaracterization of the record and proceedings below cannot hide that the District Court properly enforced an agreed forum selection clause contained in a charter party and dismissed this action for improper venue. The United States Court of Appeals for the Fifth Circuit has already addressed Petitioner's continued conflation of jurisdiction and venue, the irrelevancy of whether the forum selection clause should be applied to the shipment between Rotterdam and Houston, and Petitioner's failure to properly plead and prove foreign law. Having failed to articulate how the Fifth

Circuit's decision is in conflict with any other as required by Supreme Court Rule 10, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM A. DURHAM
Counsel of Record
BRONWYN G. DOUGLASS
EASTHAM, WATSON, DALE
& FORNEY, LLP
808 Travis Street
20th Floor,
Niels Esperson Building
Houston, TX 77002
(713) 225-0905 – Telephone
(713) 225-2907 – Telefax

Attorneys for Respondents,
Probo Elk Shipping Inc.
(also as Claimant Owner) and
Laurin Tankers America, Inc.